Office Supreme Court, U.S.
FILED
JUN 15 1981
ALEXANDER L. STEVAS,
CLERK

80-2138

No.

Supreme Court of the United States

October Term, 1980

IRIS CARTER,
Petitioner,

vs.

DAYTON BOARD OF EDUCATION

and

JOHN E. MAXWELL,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

CHARLES E. GUERRIER
BARBARA KAYE BESSER
DONALD J. MCTIGUE
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 621-3443

RANDAL S. BLOCH
700 Formica Building
120 East Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-4420
Attorneys for Petitioner

Of Counsel:
HAROLD WAGNER
700 Formica Building
120 East Fourth Street
Cincinnati, Ohio 45202

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

QUESTIONS PRESENTED

1. Is a private suit by an employee against her employer for alleged sex discrimination in promotions authorized by Title IX of the Education Amendments of 1972, Title 20, U.S.C. §1681, when it is established that the employer, an educational institution, is the recipent of federal financial assistance which is deposited to the general revenues of the recipient institution and is used by the institution to defray a portion of the salaries of its employees?

2. Was the evidentiary burden imposed upon plaintiff inconsistent with this Court's recent decision in *Texas Department of Community Affairs v. Burdine*?

3. Did the Court below err in holding that respondent had articulated a legitimate nondiscriminatory reason for failing to promote petitioner or that petitioner failed to demonstrate that respondent's reasons were pretextual?

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PETITION FOR WRIT OF CERTIORARI
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For the Sixth Circuit

Petitioner Iris Carter prays that a writ of certiorari issue to the United States Court of Appeals for the Sixth Circuit to review the judgment entered in the above entitled case on March 17, 1981.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is not reported. It is set forth in the Appendix at pp. A1-A4. The Judgment and Order of the United States District Court for the Southern District of Ohio accepting the recommendations of the Master is set forth in the Appendix at pp. A5-A7. The Report and Recommendation of the magistrate is set forth in the Appendix

at pp. A8-A35. The Order of the District Court dismissing various aspects of Plaintiff's Complaint is set forth in the Appendix at pp. A36-A37.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered March 17, 19[illegible] The jurisdiction of this Court is invoked pursuant to the provisions of Title 28 U.S.C. §1254(1).

STATUTES INVOLVED

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. §1681(a) provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> **(1) Classes of educational institutions subject to prohibition**
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> **(2) Educational institutions commencing planned change in admissions**
>
> in regard to admissions to educational institutions, this section shall not apply (A) for one year from

June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher ed-

ucation which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 703(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a) provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of

such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

Iris Carter brought suit against her employer the Dayton Board of Education and John E. Maxwell, Superintendent of Schools, on December 23, 1977. Ms. Carter alleged, *inter alia*, that the Superintendent and the Board had failed to promote her to the position of elementary principal because of her sex. She sought relief pursuant to both Title VII of the Civil Rights Act of 1964, as amended, Title 42 U.S.C. §2000e et seq. and Title IX of the Education Amendments of 1972, Title 20 U.S.C. §1681. The jurisdiction of the district court was invoked under Title VII, Title IX and Title 28 U.S.C. §§1331, 1343.

Prior to instituting this action, Ms. Carter had exhausted all available administrative remedies, having filed charges of discrimination with both the Equal Employment Opportunity Commission and the Office for Civil Rights of the Department of Health, Education and Welfare.

In January, 1978, the Defendants moved to dismiss the Title IX aspect of Plaintiff's complaint arguing that the district court did not have jurisdiction over private suits to enforce Title IX. Relevant to this motion, Plaintiff filed numerous affidavits and exhibits describing the extent of the federal financial assistance received by the Defendants and the manner in which this money was expended.

In its order of June 21, 1978, the district court concluded that Title IX "does not create a private right of action for redress of employment discrimination" (A36). That allegation of Plaintiff's complaint was thereby dismissed.[1]

On October 13, 1978, the case was assigned to a magistrate "to hold hearings, receive evidence and report to the Court."

Trial was had to the magistrate in November, 1978, and in February, 1979, the magistrate filed his Report and Recommended Decision with the Court (A9). The magistrate found that, under the test outlined in *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); and *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1979), Ms. Carter had established a prima facie case of sex discrimination with regard to the failure to promote her to principal in 1974. The burden of going forward thus shifted to the Defendants to articulate a legitimate non-discriminatory reason for their actions.

After outlining the reasons stated by Superintendent Maxwell for making his decision (A22-23), the magistrate concluded that the Defendants had met their burden of articulating a legitimate reason for failing to promote Ms. Carter.

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1. Plaintiff's complaint was filed as a class action. It included allegations that the Defendants discriminated against women as a class by failing to promote them to administrative positions and through the application of its salary system. However, as discovery progressed, it became apparent that certain of the allegations of the complaint, as well as the class action allegations, had no factual support and therefore were dropped from the litigation. Cf. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 422 (1978) (Plaintiff may be assessed her opponent's attorney's fees if she continues to litigate a claim after it becomes groundless).

Turning to the question of pretext, the magistrate concluded that Ms. Carter had offered no evidence to establish that the reasons given by Superintendent Maxwell for not promoting her were pretextual. Rather, the magistrate understood the Plaintiff to have relied solely upon certain statistical summaries to carry her burden of persuasion. Finding that these summaries were "unreliable", the magistrate concluded that Plaintiff had failed to meet her burden of persuasion and recommended that judgment be entered in favor of the Defendants.

Plaintiff filed a timely motion to review the Report and Recommendation of the magistrate along with objections to that Report. In addition to the contention that numerous critical findings of fact were clearly erroneous, Plaintiff challenged the application of the law to the facts as found. At a hearing held on this motion before United States District Judge Carl Rubin, Plaintiff raised two issues of law. Because *Cannon v. University of Chicago*, ... U.S. ....., 99 S. Ct. 1946 (1979) had recently been decided, Plaintiff moved orally to reconsider the court's order of June 21, 1978, which dismissed the Title IX aspects of her case. Furthermore, because of certain implications arising from the testimony and the findings of fact of the magistrate, Plaintiff moved, pursuant to Rule 15, Fed. Rules Civ. Proc., to amend her complaint in order to conform to the evidence to include allegations of violations of the Fourteenth Amendment as well as Title 42 U.S.C. §§1981, 1983, 1985 and 2000d.

On May 31, 1979, the district court, in a one page order, accepted the recommendations of the magistrate and entered judgment for the defendants. The court did not comment upon Plaintiff's motion to reconsider or to amend.

On appeal, Plaintiff argued that certain key facts were clearly erroneous, that the court had erred in applying

the Title VII standards to the facts and that the court erred in failing to reinstate the Title IX case of action.

The court of appeals, in an order entered by the clerk, affirmed the judgment of the district court (A1). With regard to the dismissal of the Title IX claim, the court ruled on the basis of *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979), *cert. denied*, 444 U.S. 972, 100 S. Ct. 467 (1979), that Title IX applies only to students involved in programs or activities receiving federal financial assistance and does not create an implied right of action for sex discrimination on the part of the employees of educational institutions receiving such assistance.

With regard to the Title VII allegations, the court found that while some of the findings of fact had uncertain support in the record, the record as a whole supported the conclusion that the decision not to promote the Plaintiff was based upon legitimate, non-sexually discriminatory reasons.

REASONS FOR GRANTING THE WRIT

1. This Petition Raises Important Issues Similar to Ones Presently Pending Before This Court

The courts of appeals are at present in conflict on the question of whether Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in any educational program or activity which receives federal financial assistance, is available for the redress of discrimination in employment. *Compare, Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir. 1979); *Islesboro School Committee v. Califano*, 593 F.2d 119 (1st Cir. 1979); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979); *Seattle University v. United*

States Department of Education, 621 F.2d 992 (9th Cir. 1980); with *North Haven Board of Education v. Hufstedler*, 629 F.2d 773 (2nd Cir. 1980); *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980).

While this Court has previously denied petitions for certiorari in *Romeo, cert. denied*, 444 U.S. 972 (1979); *Islesboro, cert. denied*, 444 U.S. 972 (1979); and *Junior College, cert. denied*, 444 U.S. 972 (1979), it recently granted certiorari in *Seattle University, cert. granted*, ... U.S. ....., 101 S. Ct. 563 (1980) No. 80-493 and *North Haven, cert. granted*, ... U.S. ....., 101 S. Ct. 1345 (1981) No. 80-986. (A petition for certiorari is presently pending in *Dougherty, petition for cert. filed* December 22, 1980, No. 80-1023.)

Because of the procedural histories of *Seattle University* and *North Haven*, the questions presented for review in those cases relate primarily to the authority of the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance. These questions necessarily must focus to some degree upon a reading of §902 of the Education Amendments of 1972 which authorizes the issuance of rules and regulations to effectuate the provisions of Title IX as well as providing for the procedure to be followed in the event the termination of federal financial assistance becomes necessary.

The present petition, however, raises an issue which is supplemental to those under consideration in *Seattle University* and *North Haven*, but of equal importance: May an individual bring a private suit pursuant to Title IX to challenge her employer's employment policies?

Private actions brought to enforce Title IX, in comparison to systemic suits spearheaded by the Department

of Education, are generally more narrow in their focus. Individuals are seeking relief for their particular injury rather than the total cutoff of all federal financial assistance to the educational institution. This Court recognized this difference in *Cannon v. University of Chicago*, ... U.S. ....., 99 S. Ct. 1946, 1965 (1979).

While the court of appeals did not elaborate upon its reasons for denying Petitioner the right to pursue her Title IX remedies, the reference to *Romeo* establishes the scope of its opinion. The court of appeals has held that under no circumstances can the employment practices of an educational institution be subject to scrutiny under Title IX since that statute was designed to benefit only students enrolled in recipient institutions. This construction of Title IX is contrary not only to the decision of the Second Circuit in *North Haven*, which found that all employees of recipient institutions are protected from discrimination by Title IX, but also conflicts with the decision of the Fifth Circuit in *Dougherty* which, although ruling that the Department of Education exceeded its authority in issuing the employment regulations, did recognize that jurisdiction over employment practices may lie on behalf of those employees whose salaries are defrayed by federal funds. 622 F.2d at 738. This conflict with the *Dougherty* opinion becomes more glaring when the facts of the present case are further examined.

In response to the Defendants' motion to dismiss Petitioner's Title IX allegations, Petitioner filed various affidavits and exhibits which detailed the federal grants and programs operating within the Dayton School System. These documents established that the Dayton School System receives substantial federal financial assistance which is utilized for employment purposes. For the 1974-1975 academic year alone $458,000 in federal impact funds,

received through the impacted areas program (Title 20 U.S.C. §236), was deposited in the general operating funds of the system and ultimately used in part to defray salaries. Neverthless, the court of appeals ruled that "the fact these federal monies went into the school system's general fund, does not provide an adequate basis for the court to depart from [its decision in *Romeo*]." (A2).

Petitioner prays that a writ of certiorari issue with regard to question 1 and that a briefing schedule be established which will allow it to be considered in conjunction with *Seattle University* and *North Haven*. In the alternative, petitioner prays that this Court defer judgment on this aspect of the petition pending a ruling in those cases.

2. The Decisions Below Conflict With Recent Decisions of This Court

In *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), this Court set forth the basic allocation of burdens and order of analysis of proof in a Title VII case alleging discriminatory treatment. Initially the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of discrimination. Should the plaintiff succeed in proving a prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employment practice being challenged. Should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons but were a pretext for discrimination.

Of course, this does not mean that all Title VII trials must proceed in these steps. The *McDonnell-Douglas* test is merely a convenient means of analyzing evidence and

is not meant to limit the focus of the court to any portion of the proceedings. *Texas Department of Community Affairs v. Burdine,* ..... U.S. ...., 101 S. Ct. 1089, 1095 n.10 (1981).

In *Burdine,* this Court further clarified the burden which is placed upon a defendant following the establishment of a prima facie case of discrimination. In order to rebut the presumption of discrimination, the defendant need only produce evidence that the plaintiff was treated as she was on the basis of a legitimate, non-discriminatory reason. The defendant need not persuade the court that it was actually motivated by the proffered reasons; however, the reasons must be established through the introduction of admissible evidence. An articulation not admitted into evidence will not suffice. *Id.* at 1094.

Once the defendant carries this burden, the presumption is rebutted and the inquiry turns to the pretext stage. We are taught that evidence which may be relevant to a showing of pretext includes facts as to the treatment of other similarly situated individuals, factual inconsistencies between the articulated reasons and the defendant's actions, as well as the defendant's general policy and practice with respect to minority employment (including statistics), which may be helpful in exposing a general pattern of discrimination against minorities or other protected groups. *McDonnell-Douglas, supra* at 804-805. *Burdine* further explains that, because of the liberal discovery rules and the accessibility of the investigatory file of the Equal Employment Opportunity Commission, a plaintiff should not find it particularly difficult to prove that a proffered explanation which lacks a factual basis is pretextual. *Burdine, supra* at 1096.

When the opinions of the district court and court of appeals are examined in light of *Burdine* it is evident that they erred in applying the Title VII test.

A. Factual errors relevant to pretext

On appeal Petitioner alleged that certain critical facts as found by the magistrate were clearly erroneous. The court of appeals held that, while these findings of fact may have had uncertain support in the record, the record as a whole supported the magistrate's conclusion that the decision not to promote the Petitioner was based upon legitimate, non-sexually discriminatory reasons. Petitioner contends that the court of appeals failed to understand the critical nature of the challenged factual findings and therefore erred in reaching its conclusion that the magistrate's decision was correct. Three instances are illustrative.

(1) At trial, Petitioner testified that, in response to her request to be considered for a principalship, she was interviewed by Superintendent Maxwell. At this interview, Maxwell informed Ms. Carter that she was the wrong color for the promotion. After she reminded the Superintendent of her background with the Dayton School System and her qualifications and interest in the job, the Superintendent again told her that he was sorry but that she was just the wrong color for the position (Transcript p. 29). When asked about this interview on the stand, Defendant Maxwell agreed that the Petitioner's description of the interview was accurate (Transcript p. 149). In actuality, Petitioner was not "the wrong color" as the white male who received the promotion that year is of the same race as Petitioner. It was this promotion which formed the basis of Petitioner's charges of discrimination which were filed with the EEOC and HEW. The magistrate apparently ignored this testimony, concluding that "Plaintiff testified that two of her *transfers* resulted from a desire of the Maxwell Administration to equalize the racial balance in the Dayton school system." (A16) (Em-

phasis added). Petitioner contends that this error, left uncorrected by the court of appeals, seriously restricted Petitioner in her ability to establish pretext.

(2) The magistrate found that Superintendent Maxwell had been responsible for numerous promotions of women to administrative positions (A18). This fact, of course, is relevant to pretext in that it relates to the general policy and practice of the Maxwell Administration toward the promotability of women. However, as pointed out to the court of appeals, and admitted by Superintendent Maxwell on the stand (Transcript pp. 648-703), this finding confuses initial appointments with promotions as well as credits the Maxwell Administration with promotions which were actually made by a previous administration. Petitioner had never complained about the treatment which she had received prior to the Maxwell Administration. However it was her contention that Superintendent Maxwell was opposed to the promotion of women to the position of elementary principal. This was evidenced by the fact that, of the more than 20 principalships filled by Superintendent Maxwell, all have been filled with men. By failing to resolve these conflicts, the court of appeals incorrectly gave the Respondents the benefit of a factual finding which has no support in the record.

(3) The magistrate concluded that there were reasons why Superintendent Maxwell did not promote Petitioner. Included among these reasons was Superintendent Maxwell's understanding that unspecified but allegedly unfavorable information had been removed from the Petitioner's personnel file, and his understanding that the Petitioner had had difficulty disciplining students. However, when these reasons were advanced at trial by Defendant Maxwell to justify his decision not to promote the Petitioner, the magistrate recognized their hearsay nature and

sustained an objection to this evidence. Nevertheless, the magistrate, and apparently the court of appeals, were both of the opinion that if the employer believes a fact to be true, regardless of whether or not it is, that misplaced belief can form the basis of a legitimate, non-discriminatory reason for denying an employee a promotion. Petitioner contends that not only did the courts below confuse facts with hearsay, but they also failed to comprehend the significance of that distinction to the question of pretext. *Burdine, supra* at 1094 ("the defendant must clearly set forth, *through the introduction of admissible evidence,* the reasons for plaintiff's rejection.") (Emphasis added).

B. Evidentiary errors

Between the time that Petitioner filed her charges of discrimination with the EEOC and HEW in July, 1974, and the trial of this matter in the fall of 1978, substantial investigations by both the EEOC and HEW occurred. As part of these investigations the Respondents had prepared numerous documents. These documents included material which was relevant to Ms. Carter's allegation, as well as general information relating to the pool of women eligible for and interested in promotion to principalships. Certain of these documents were summaries of the voluminous personnel files which are maintained by the Dayton school system. They included the EEO-5 forms which are required to be maintained by educational employers (Chapter XIV, Title 29, Code of Federal Regulations, Subpart L, §1602.39), a school by school analysis of the principalship appointments made from 1972 through 1976 with indications of the race and sex of those individuals appointed, a 1975-1976 eligibility list of those who at that time held certification for elementary principal, a list of individuals who requested promotion from 1972 through 1976 indicating the race and sex of each individual and a list of

all individuals appointed to principalships from 1972 through 1977 indicating the school to which each individual was assigned and the date of said appointment.

During the preparation for trial these documents and summaries were examined by both parties and they ultimately became joint exhibits. At trial these exhibits were also the subject of a stipulation as to authenticity and accuracy.

On the basis of these exhibits Petitioner sought to establish that the exercise of Superintendent Maxwell's judgment in making promotions resulted in the total exclusion of women from principalships.

In addition to these joint exhibits the Respondents introduced new compilations, prepared just prior to trial, which conflicted with the documents previously provided to the EEOC and HEW. Because of these inconsistencies and the belief that the joint exhibits were not business records of the Respondents, the magistrate concluded that they were of no evidentiary value (A30-31).

Petitioner contends that this ruling is erroneous in light of the recent decision in *Burdine*. *Burdine* makes clear that inconsistencies between materials submitted to the EEOC during an investigation of a charge of discrimination and an "articulated" defense at trial can be probative of pretext. *Burdine, supra* at 1096. However, both the magistrate and the court of appeals concluded that such inconsistencies mandated the total exclusion of the evidence. If indeed this is a correct reading of this Court's decision in *Burdine*, then not only will plaintiffs find pretext difficult to prove, it may in many instances be impossible. The inconsistency and unreliability of the records of an employer when conjoined with a totally subjective decision making process, requires a more sensitive exam-

ination of pretext than that accorded by either the magistrate or the court of appeals.

Petitioner prays that a writ of certiorari issue with regard to question 2 and 3. In the alternative, Petitioner prays that this Court reverse the judgment of the court of appeals and remand this case to the district court for reconsideration in light of *Burdine*.

CONCLUSION

For the reasons outlined above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

CHARLES E. GUERRIER
BARBARA KAYE BESSER
DONALD J. MCTIGUE
620 Keith Building
1621 Euclid Avenue
Cleveland, Ohio 44115
Telephone: (216) 621-3443
RANDAL S. BLOCH
700 Formica Building
120 East Fourth Street
Cincinnati, Ohio 45202
Telephone: (513) 421-4420
Attorneys for Petitioner

Of Counsel:
HAROLD WAGNER
700 Formica Building
120 East Fourth Street
Cincinnati, Ohio 45202